

# THE STATE OF NEW HAMPSHIRE

## SUPREME COURT

**In Case No. 2004-0590, State of New Hampshire v. Elvis Burke, the court on January 9, 2006, issued the following order:**

Following a jury trial, the defendant, Elvis Burke, was convicted on three counts of aggravated felonious sexual assault. On appeal, he contends that the trial court erred in: (1) excluding the victim's prior inconsistent statement; (2) admitting the victim's prior consistent statement; and (3) excluding the defendant's denial of guilt. We affirm.

Absent an unsustainable exercise of discretion, we will affirm the decision of the trial court to admit or exclude evidence. State v. Dupont, 149 N.H. 70, 81-82 (2003). To establish an unsustainable exercise of discretion, the defendant must show that the trial court's rulings were clearly untenable or unreasonable to the prejudice of his case. *Id.* at 82.

The defendant first argues that the trial court erred in preventing him from impeaching the victim with extrinsic evidence. The victim testified that she never called the defendant's then girlfriend. The defendant argues that this testimony was sufficient to admit evidence through two other witnesses about messages the victim had left on the girlfriend's answering machine. Even if we assume without deciding that the trial court's ruling was error, we conclude it was harmless. See State v. Fox, 150 N.H. 623, 624 (2004) (error is harmless if State establishes that error did not affect verdict; we review strength of evidence State presented at trial and character of excluded evidence, including whether it was cumulative). In this case, the evidence included testimony by the victim of the defendant's continual physical and sexual assaults, testimony by a witness who observed the victim's bruises, and testimony by witnesses about the defendant's controlling behavior and the authority he believed he had over the victim as a result of their marriage. To the extent that the defendant sought to admit the evidence to establish that the victim had said that she hated the defendant and wanted him "to rot in jail," the victim had already admitted that in her testimony; the excluded evidence would therefore have been cumulative. See id.

The defendant also argues that the trial court erred in admitting the victim's prior consistent statements. The defendant called a DCYF worker as a witness; she testified that when she first contacted the victim, the victim stated that her relationship with the defendant was fine. When the victim subsequently obtained a restraining order against him, the DCYF worker called to discuss a safety plan. At that time, the victim advised her that the defendant had sexually assaulted her more than once.

Absent an unsustainable exercise of discretion, we will affirm the decision of a trial court to admit a prior consistent statement for the non-substantive purpose of rehabilitating a witness's credibility. See State v. Hennessey, 142 N.H. 149, 159 (1997); State v. Lambert, 147 N.H. 295, 296 (2001) (explaining unsustainable exercise of discretion standard). In this case, defense counsel elicited testimony from the DCYF worker that, when the victim first spoke to her, she reported that she had been sexually assaulted more than once. On cross-examination, the State asked whether the victim had also reported that the defendant had threatened to kill her. The question demonstrated that the victim's testimony at trial was consistent with her earlier statement to DCYF. When the defendant limited his inquiry to certain statements that the victim had made to the DCYF worker during their conversation, the jury could have concluded that the victim had not previously made the other statements. The trial court could therefore have determined that the remaining statements were admissible to allow the jury to have the complete record before it as it evaluated the victim's credibility. See Hennessey, 142 N.H. at 159-60.

The defendant also argues that the trial court erred in excluding his post-arrest statement professing his innocence. Even if we assume that this exclusion was error, we conclude that, based on the overwhelming evidence of guilt previously addressed in this order, it was harmless.

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,  
Clerk**